

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EZEQUIEL VILLA-GUTIERREZ,

Defendant.

8:07CR112

MEMORANDUM AND ORDER

This matter is before the court on the defendant Ezequiel Villa-Gutierrez's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody under [28 U.S.C. § 2255](#) ("[§ 2255](#)"). Filing No. [47](#), § 2255 Motion. The defendant pleaded guilty to count I of the indictment, possession with intent to distribute 50 grams or more of methamphetamine (mixture). Filing No. [1](#), Indictment; Filing No. 38, Plea Hearing. The court sentenced the defendant to a 60 month term of imprisonment, followed by five years of supervised release with special conditions. Filing No. [44](#), Judgment. In his § 2255 motion, the defendant claims his plea should be vacated and set aside because of a right newly recognized by the United States Supreme Court. Filing No. [47](#) at 11. The movant requests that the court retroactively apply the *Padilla v. Kentucky* holding to this case. *Id.*; [Padilla v. Kentucky, 130 S.Ct. 1473 \(2010\)](#). The defendant also filed a motion to appoint counsel in connection with his § 2255 motion. Filing No. [57](#), Motion to Appoint Counsel.

Under [28 U.S.C. § 2255](#), a federal prisoner is entitled to "relief if his 'sentence was imposed in violation of the Constitution or laws of the United States, or . . . was in excess of the maximum authorized by law.'" [King v. United States, 595 F.3d 844, 852](#)

(8th Cir. 2010) (quoting [28 U.S.C.A. § 2255\(a\)](#)). A movant may raise ineffective assistance of counsel issues in collateral proceedings. See [United States v. Hughes, 330 F.3d 1068, 1069 \(8th Cir. 2003\)](#). “The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.” [Kimmelman v. Morrison, 477 U.S. 365, 374 \(1986\)](#). Under the Fifth and Sixth Amendments, the right to assistance of counsel extends to both trial and to a defendant’s first appeal of right. See [Gideon v. Wainwright, 372 U.S. 335, 344 \(1963\)](#) (stating the right to counsel is fundamental at the trial level); [Evitts v. Lucey, 469 U.S. 387, 392-93 \(1985\)](#) (discussing the fundamental right to effective assistance of counsel on a criminal defendant’s first appeal as of right).

The right to counsel includes the right to reasonably effective counsel. [Strickland v. Washington, 466 U.S. 668, 686 \(1984\)](#) (quoting [McMann v. Richardson, 397 U.S. 759, 771, n.14 \(1970\)](#)). In order to make out a claim of ineffective assistance, a petitioner must satisfy the familiar two-part *Strickland* standard, “which requires a showing ‘that his lawyer’s performance fell below the minimum standards of professional competence (deficient performance) and that there is a reasonable probability that the result of the proceedings would have been different if his lawyer had performed competently (prejudice).’” [King, 595 F.3d at 852](#) (quoting [Alaniz v. United States, 351 F.3d 365, 367-68 \(8th Cir. 2003\)](#)).

Under *Padilla*, the United States Supreme Court held “that counsel must inform her client whether his plea carries a risk of deportation.” [Padilla, 130 S.Ct. at 1486](#). Counsel’s failure to inform his or her client about this risk satisfies the deficient performance prong of the *Strickland* test. [Id. at 1477](#). However, in *Chaidez v. United*

States, the Supreme Court held that *Padilla* does not apply retroactively. *Chaidez v. United States*, 133 S.Ct. 1103, 1113 (2013). “[D]efendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding.” *Id.*

The Supreme Court decided *Padilla* about three years after the judgment in Mr. Villa-Gutierrez’s case. *Id.*; Filing No. 44 (dated November 29, 2007). Therefore, *Padilla* does not apply to the defendant’s motion under the *Chiadez* holding. Because *Padilla* does not apply, the defendant’s § 2255 motion must be dismissed.

THEREFORE, IT IS ORDERED:

1. The court denies the defendant’s Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody Under 28 U.S.C. § 2255, Filing No. 47.
2. The court denies the defendant’s Motion to Appoint Counsel, Filing No. 57, as moot.

Dated this 14th day of June, 2013.

BY THE COURT:

s/ Joseph F. Bataillon
United States District Judge